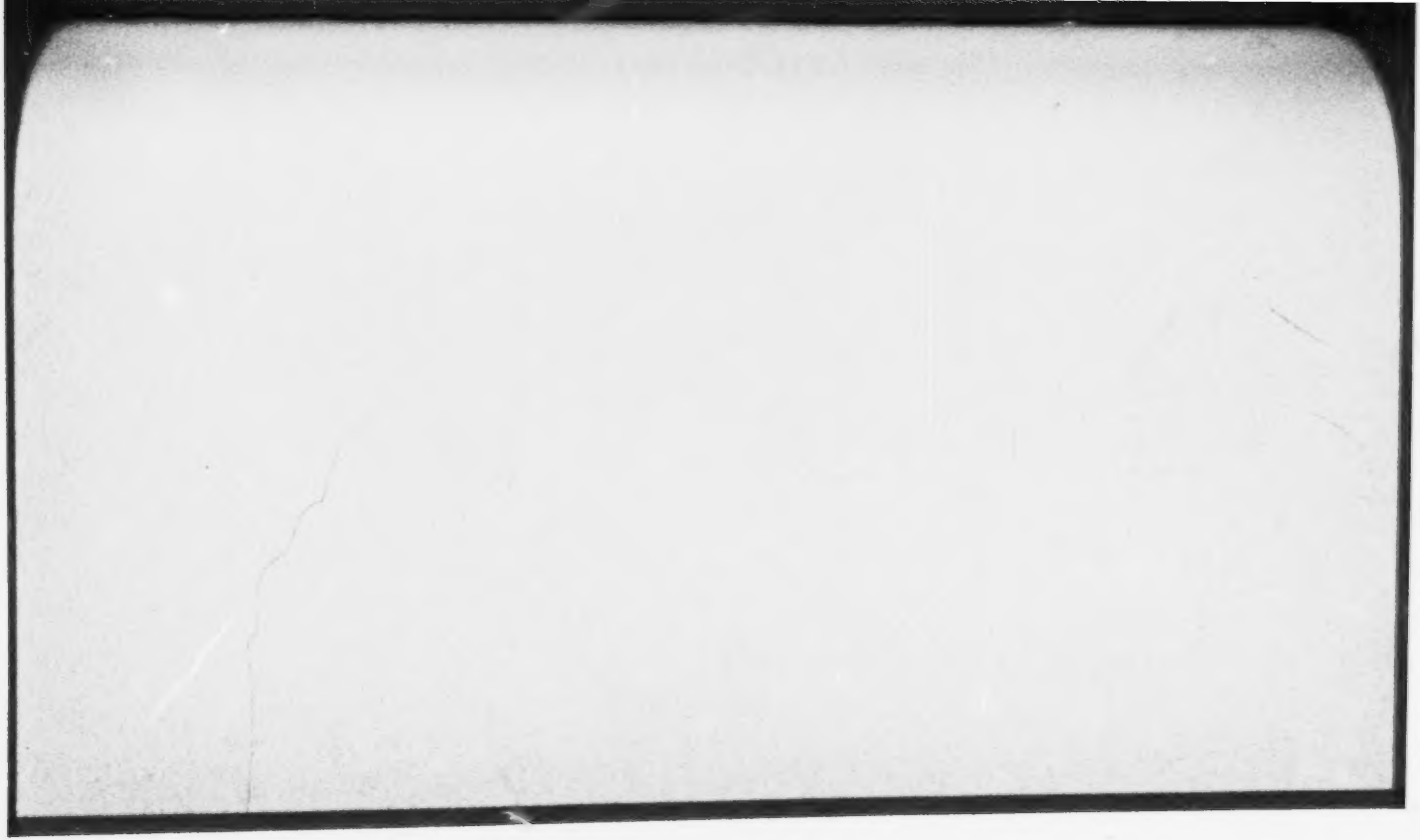

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. ~~283~~ 33

THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA AND FORT SMITH RAILWAY COMPANY, *Plaintiffs in Error*,

vs.

ROAD IMPROVEMENT DISTRICT No. 3 OF SEVIER COUNTY, ARKANSAS, ET AL., *Defendants in Error*.

In Error and on Writ of Certiorari to the Supreme Court of the State of Arkansas.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

SOME CORRECTIONS AND EXPLANATIONS OF STATEMENTS IN BRIEF OF DEFENDANTS IN ERROR.

1. On pages 34 *et seq.* of their brief, defendants in error, herein called defendants, refer to our statement that the value of some of the property of plaintiffs was included twice, on the assessment roll, and that, thereby, two assessments of benefits were imposed on it.

We gave, as an illustration, the assessment, on page 141 of the record, of benefits of $50.00 against right of way belonging to plaintiffs, although the value of such right of way was also included in the value of main track, and there assessed benefits. We referred to this right of way because it was clearly so described in the record, and there could be no dispute that the value of this land was included twice.

As a matter of fact, however, all of the land owned by plaintiffs in Road District No. 3 was included in the valuation of main track of $27,000 per mile, and a large part of it was then assessed additional benefits, as property not used for railroad purposes (Rec. 141). As stated in the testimony (Rec. 166-167, 175-176), the entire value of the railroad, tangible and intangible, after the deduction of the value of the side tracks, buildings, rolling stock, and materials and stores, is included in the value of the main track. The value of the land is therefore included in the value of main track, but it was again spread on the assessment roll and assessed benefits on page 141 of the record. We referred, in our original brief, to an identical case of double assessment in *St. Louis-San Francisco Ry. Co.* v. *Sebastian Bridge District*, 293 Fed. 729.

Defendants cite the case of *Southern Railroad Company* v. *Watts*, 260 U. S. 519, in support of the proposition that double taxation by a state does not violate the Fourteenth Amendment.

The rule is stated as follows in the case of *Fort Smith Lumber Company* v. *Arkansas*, 251 U. S. 532, where the court said:

> The Fourteenth Amendment no more forbids double taxation than it does doubling the amount

of the tax; short of confiscation or proceedings unconstitutional on other grounds.

It is recognized, however, that double taxation is, as a general rule, unjust, and it is not to be presumed that it was intended unless it is a necessary result of the provisions of the law. It usually arises where different taxing schemes over-lap.

In the case of *Tennessee* v. *Whitworth*, 117 U. S. 129, it was said:

> In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all; and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition.

In the case of *Buck* v. *Beach*, 206 U. S. 392, the court said:

> Our decision in this case has no tendency to aid the owner of taxable property in an effort to avoid or evade proper and legitimate taxation. . . . . It does, however, tend to prevent the taxation in one state of property in the shape of debts not existing there, and which, if so taxed,

> would make double taxation almost sure, which is certainly not to be desired, and ought, whenever possible, to be prevented.

Furthermore, we did not refer to this as double taxation, and we do not think it is properly so termed. We said there was a double assessment. There were not two independent taxes, or proceedings for the assessment of benefits, but the same assessment of benefits was imposed twice upon some of the property. There was included the value of more property than plaintiffs owned, since some of it was included twice. To the extent that such property was included a second time, there was no such property, and it was clearly a taking of property without due process of law to assess benefits against plaintiffs on property which did not exist.

It also denied plaintiffs the equal protection of the law.

2. On pages 28 and 29 of their brief, defendants call attention to our statement that the assessments, shown on page 32 of the record, were at the rate of $4.13 per acre, and say:

> It is very misleading to select one page of the assessment record and strike an average of the assessed value per acre for the purpose of trying to show that the acreage property of the district is very much under-valued.

A reading of our original brief will show, however, that we did not use the figure complained of, which appears on page 36 of our brief, for purposes of general comparison. On the contrary, we used, for this purpose, the average benefits and average assessed value, per acre, of all the farm, or rather, acreage, property in the district. On page 38, of our brief, we said:

The average assessment of benefits per acre against the farm lands was only $5.24 per acre, and the average assessed value for taxation, including improvements, was $6.43. That is, there was a total of 64,742.93 acres of farm lands assessed with benefits, as shown by the assessment roll (Rec. 32-142). The total amount of assessed benefits against the same was $339,391, and the total assessed value, $416,463.00.

3. On page 33 of defendants' brief, they state that:

Plaintiffs' property being located in DeQueen should be assessed on the same basis as the other lots in the town are assessed.

A reference to the map (Rec. 164), and to the assessment roll (Rec. 32-144) shows that plaintiffs are assessed benefits upon property both within and without the city limits of DeQueen, and that they own acreage property as well as town lots and blocks. Consequently, the comparison of the assessment against plaintiffs' property, out in the country, should be with the average assessment of benefits against the farm property, and the comparison in DeQueen should be with acreage property, as well as platted property.

Defendants say, on page 33 of their brief, that "counsel are in error in assuming that all the area within the corporate limits of DeQueen and Lockesburg is platted property."

We made no such assumption. We took, in DeQueen for example, the entire area, in acres, of the district within DeQueen, and divided it into the total assessed benefits.

Since receiving the brief of defendants, we have rechecked our computations. The map (Rec. 164) shows that the District occupies, in the town of DeQueen, more

than half of Section 30 (320 acres and more); more than half of the S½ of Section 19 (160 acres and more); the W½ of the SW¼ of Section 20 (80 acres), and the W½ of the NW¼ of Section 29 (80 acres), a total of more than 640 acres.

Any acreage property in the District, within the city limits of DeQueen, is located in Section 30, the S½ of Section 19, the W½ of the SW¼ of Section 20, and the W½ of the NW¼ of Section 29.

We have accordingly, had prepared a statement showing the total amount of benefits assessed against the acreage property, within the city limits of DeQueen, and have added the total assessment of benefits against the platted property in DeQueen, the latter appearing on Pages 101 to 127, inclusive, of the record. This statement shows:

Rec.	Owner	Description	Area	Benefit
128.	O'Connor, D. E.	Pt. SW SE 30-8-31	1.5	$ 66.66
	Gradin, H. M.	" NE NE "	2.0	62.50
	Spence, John	" NE SE "	1.0	50.00
	Fowler, W. M.	" SE "	.5	50.00
	C. P. Service Co.	" NW SE "	2.0	12.50
	Thomason, Jno.	" SW "	1.0	50.00
	Griffin, E. E.	" "	4.0	18.75
	Sorrells, J. K.	"	.3	33.33
	Selph, Carl	"	3.7	20.30
Rec.	Dierks L. & C. Co.	NE NE "	40.0	1,200.00
129.	" " " " "	N½ SE NE "	20.0	600.00
	" " " " "	S½ NE SE "	20.0	1,800.00
	" " " " "	NW NE E-KCS "	30.0	180.00
	" " " " "	SW NE " "	13.5	120.00
	C. W. P. S. Co.	NW NW SE " "	10.0	6,000.00
	Province G. S.	SW NW SE " "	2.5	120.00
	Locks, C. B.	S½ NW SE " "	12.0	480.00
	Thomas, W. F.	SW SE " "	9.0	60.00
	Payne, B. F.	SE SE Ex 4 ac. NE Co. "	34.0	480.00
	Good, Clara A.	NE Cor. SE SE "	4.0	300.00
	KCS & T&FS	W 935 ft. SE¼ Ex 100' R/W "	45.40	960.00
	Hartly & Thomas	E½ N½ NW SW 20-8-31	15.00	200.00
	Bush, J. F.	W½ N½ NW SW "	5.00	25.00
	Harben, J. H.	SW NW SW "	10.00	500.00
	Unknown	SE NW SW "	10.00	150.00
	Reese, D. D.	SW SW SW "	10.00	400.00
Rec.	Shepard, J. C.	W½ NW SW SW "	5.00	125.00
142.	Brown, C. P. Est.	E½ NW SW SW "	5.00	50.00
	Garrison, W. D. Est.	N½ E½ SW SW "	15.00	150.00
		Total acreage property	331.40	$14,264.04
		Total platted property		74,354.40
		Total assessment of benefits in DeQueen		$88,618.44

Our estimate, given above, shows that there are considerably more than 640 acres, in the District, which are within the city limits of DeQueen. In order to cover the land assessed against plaintiffs as railroad property, and city streets and alleys, we have deducted

140 acres, leaving 500 acres as the area on which to average the above assessment of benefits of $88,618.44. This would give an average assessment of benefits, per acre, of $177.24. The estimate of 500 acres would seem to be sufficiently low, for the reason, as shown in the above statement, that there are 45.45 acres of unplatted land, and also several blocks, or parts of blocks, belonging to plaintiffs (Rec. 7-8), which are assessed as non-railroad property.

This assessment of benefits should be compared with an assessment against plaintiffs' main line right of way of $328.00 per acre (See page 39 of our original brief).

Or, if we assume that, in the whole District, there are 50 acres occupied by main line right of way, side tracks and buildings (in addition to the 100 acres assessed benefits as non-railroad property, that is, the 96.40 acres described on page 43 of our original brief, plus the acreage of the town lots described on pages 7 and 8 of the record), the total assessed benefits of $21,270.00 will amount to $425.40 per acre, as compared with an average assessment of benefits against acreage property of $5.24 per acre, and against property in the town of DeQueen of $177.24 per acre.

4. But we do not wish to obscure, by laborious comparisons of this kind, our real contentions in the case. We submit that this assessment of benefits, upon the basis of the assessed value, is an entirely improper method, and illegal, for the following reasons:

(a) No assessment of benefits which exceeds the actual benefits to property from a public improvement is valid. We showed, under Proposition I of our original brief, that the assessment of benefits against the property of plaintiffs was far in excess of the amount

of benefits, if any, which could possibly accrue to the plaintiffs from the construction of Road No. 3.

(b) Any method for the assessment of benefits must be calculated to produce reasonably correct results. The assessors claimed that they assessed both the town property, and the acreage property, at certain percentages of their assessed value for general taxation, but, as shown in our original brief, these percentages were not uniformly, or even generally, applied. We also showed that a great deal of the property in the District is very much under-assessed in value, so that it cannot be taken as the correct measure either of the true value of the property in the District, or as the measure of the relative value of the different classes of property. This demonstrated, in our opinion, that, even if the assessed value for purposes of general taxation may properly be used, in some cases, for the assessment of benefits, the assessment roll, here under consideration, is so faulty and unequal that it cannot be properly used in assessing benefits since there is no reason to think that its use will produce a reasonably uniform and correct assessment of benefits.

We submit that what was said in the case of *Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U. S. 55, applies here. In that case, the court said:

> The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout.

5. In our opinion, also, the only correct method of assessing benefits is by a computation of the actual benefits in a manner similar to that set forth in Proposition I, of our original brief. If the property of the Dis-

trict were all devoted to one class of business, and the improvements on the land were of the same general character and relative value, probably some mechanical form of assessment would not produce very much injustice. As a matter of fact, however, the benefit from an improvement of this kind does not vary in substantially exact ratio to the value of the real estate and improvements thereon, which is the necessary assumption of the assessors in using the rule for the assessment of benefits which they claim to have used. Take a sawmill, for instance, which has an industry track at the mill, the logs being brought in by rail, and the finished lumber being shipped out by rail. The value of the property of the sawmill would be many times that of the ordinary farm occupying the same acreage of land, and, yet, the sawmill would not be benefited any more, and probably not as much, as would the farm. The assessment of benefits against the sawmill property, however, under this rule of using the assessed value for general taxation, would be much greater than against the farm. Other industries, such as mines and factories, served by railroad tracks, or so situated that they would not use in their operations the highway which was being improved, will readily suggest themselves.

The fact that the use of the assessed value for general taxation is not necessarily, or even presumptively correct, is recognized in the following cases, which were cited in our original brief:

Thomas v. *Kansas City Southern Railway Company*, 277 Fed. 708, 712.

Missouri Pacific R. Co. v. *Road Improvement District No.* 1, 288 Fed. 502.

Assessments for general taxation, and assessments of benefits resulting from public improvements, are on

entirely different bases. This court, in the case of *Commissioners of Road Improvement District No.* 2 v. *St. Louis S. W. R. Co.*, 257 U. S. 547, said:

> Assessments for benefits and damages are different in their essential characteristics, from those for general taxation. *Paving District* v. *Sisters of Mercy*, 86 Ark. 109, 109 S. W., 1165, 15 Ann Cases, 347.

The burden of proof appears to have been upon the Road District. *Commissioners of Road Improvement District No.* 2 v. *St. Louis S. W. R. Co.*, 257 U. S. 547, 559.

6. Defendants, on page 33 of their brief, assumed that city blocks are only 200 feet in length and width, giving an area of a little less than an acre to the block. Obviously, these would be unusually small blocks, and defendants' assumption would appear to be clearly erroneous, at least as to some of the blocks. Some of the blocks in Lockesburg contain 26 and 38 lots, respectively (Rec. 100). Assuming that each lot has a frontage of 25 feet, these blocks would have a length of 325 feet and 475 feet, respectively. Likewise, in DeQueen, there are blocks containing 20 and 24 lots, respectively (Rec. 7-104-106). With a frontage of 25 feet per lot, these blocks would have a length, respectively, of 250 and 300 feet. A block 300 feet square would contain 90,000 square feet, something more than two acres, since an acre has an area of 43,560 square feet.

7. Defendants say, on pages 6 and 7 of their brief, that the tonnage of plaintiffs has increased. As we read the record, there is no testimony to the effect that the total tonnage received by the plaintiffs, from this Road District 3, or from the construction of this highway, has increased. There was no testimony as to the total ton-

nage, and it was stated that, to a very considerable extent, there was simply a substitution of one crop for another (Rec. 285-296).

8. Defendants, on pages 21 and 22 of their brief, attempt to minimize the amount of the assessment which must be paid by the plaintiffs under the present assessment. They state that the assessment against the plaintiffs will probably not exceed $200.00 a year, since it is expected that the revenues from a license tax on motor vehicles and a tax on gasoline and oil will be applied on the expenses of this, and the other road districts in Sevier County. This is no justification for an arbitrary and excessive assessments of benefits. Moreover, we are very doubtful whether defendants' pleasant prophecy will be realized. The annual assessment against plaintiffs, in 1920, on account of this Road District, was $744.45, being 3½ per cent of the total benefits of $21,270, assessed against plaintiffs' so-called railroad property (Rec. 298). It is our experience that these road districts more often over-expend, rather than under-expend.

Respectfully submitted,

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